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Supreme Court of the United States

OCTOBER TERM, 1949.

No. 519.

VIVIAN COWGILL MENEES, PETITIONER,
VS.
LILLIAN COWGILL ET AL., RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI, DIVISION NUMBER ONE.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Vivian Cowgill Menees, respectfully petitions for a writ of certiorari to review the final judgment and decision of the Supreme Court of Missouri, Division Number One, the highest court of the State (Motion to transfer to the court *en banc* having been filed and overruled), modifying a judgment of the Circuit Court of Jackson County, Missouri, and as modified, affirming said judgment to the effect that your petitioner, while the equitably adopted daughter of defendant, Lillian Cowgill, that as between petitioner and all respondents (cousins of Guy M. Cowgill), she was not the adopted daughter of

Guy M. Cowgill, deceased husband of Lillian Cowgill, and had no rights or status as such, having held in the opinion that a Missouri equitable adoption (controlled by Missouri law), is binding only on the parties to the adoption contract or those in privity with such parties, and refusing to apply the laws of descent and distribution of the State of Iowa, though pleaded and relied upon by all the parties to the suit, to determine whether or not, since properties mentioned in the pleadings were controlled by the laws of Iowa and all parties to the suit were claiming through the identical sections of that law, through and by virtue of such laws and the identity of claims made, the petitioner and respondents were or were not in fact privies as regards the descent of that property. If the issue of privity (claimed under Iowa law) had been determined, and, determined favorably to the petitioner, then she would have been declared the adopted daughter (claimed under Missouri law) of Guy M. Cowgill, deceased.

OPINIONS BELOW.

The opinion of the Supreme Court of Missouri, Division Number One, is reported in Vivian Cowgill Menees, Appellant, vs. Lillian Cowgill *et al.*, Respondents, 223 S. W. 2d 412. Copy of opinion (R. 42) and the opinion of the Kansas City Court of Appeals, transferring said cause to the Supreme Court, is found in Menees vs. Cowgill, (Mo. App.) 214 S. W. 2d 561, 571.

JURISDICTION.

This action is brought under the Missouri Declaratory Judgment Act, and respondents were made parties defendant as required by that act for the reason that petitioner and respondents both claimed property being

administered upon in Montgomery County, State of Iowa, petitioner and respondents claiming said property through the identical statutes of the State of Iowa, the petitioner pleading a claimed status and reliance upon said statutes, as provided by Missouri law, and respondents pleading the effect thereof, and admitting or pleading that if petitioner have the claimed status of an adopted child that she then would be entitled to said property under Iowa law, and that if she be not the adopted daughter of one Guy M. Cowgill, then respondents would be entitled to all said property under the laws of said state.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257, in that petitioner in said proceedings claimed the constitutional right and privilege granted to her by Section 1, Article IV of the Constitution of the United States to have the Supreme Court of Missouri give full faith and credit to the public acts of the state of Iowa. The opinion and judgment of the Supreme Court of Missouri, Division One, was entered on the 12th day of September, 1949 (R. 41-52) and petitioner's motion for rehearing (and to transfer to Court *en banc*) was denied by that court on October 10, 1949 (R. 66). The Iowa statutes were neither discussed nor applied by the Supreme Court.

STATUTES INVOLVED.

The applicable statutory provisions from the Iowa 1939 Code relied upon and pleaded by all the parties follow:

> "Section 12017. If the intestate leave no issue, the one-half of his estate shall go to his parents and the other half to his wife; if he leaves no wife the portion which would have gone to her shall go to his parents.
>
> Section 12024. If one of his parents be dead, the portion which would have gone to such deceased par-

ent shall go to the surviving parent, including the portion which would have belonged to the intestate's wife had she been living.

Section 12025. If both parents be dead, the portion which would have fallen to their share by the above rule, shall be disposed of in the same manner as if they had outlived the intestate and died in the possession and ownership of the portion thus falling to their share, and so on through ascending ancestors and their issue.

Section 12016. Subject to the rights and charges hereinbefore provided, the remaining estate of which the deceased shall, in the absence of a will, descend in equal shares to his children, unless one or more of them is dead, in which case the heirs of such shall inherit his or her share in accordance with the rules herein prescribed, in the same manner as though such child had outlived its parents."

QUESTIONS PRESENTED.

No state court has heretofore attempted to settle an issue between litigants involving the descent of property located in another state without applying the laws of the state where the property was located, nor has any state heretofore chosen to ignore the pleaded laws of another state in making a decision germane to the descent of property in that state. The following federal questions are therefore, for decision by this Court for the first time.

1. In determining matters germane to the descent of Iowa property can a Missouri court wholly ignore the applicable and pleaded laws of descent and distribution of the state of Iowa without violating Section 1, Article IV, of the Constitution of the United States?

2. Where, as regards the disposition of property located in Iowa, the only issue between litigants claiming

rights to such property is whether or not there is privity of claim between them—the presence of such privity being the determining factor in petitioner's right to claimed status—the litigants all pleading and relying upon the identical sections of the Iowa law as the basis of their several claims to such property, then and under such circumstances, can a Missouri court ignore the pleaded applicable Iowa statutes and determine both the petitioner's status *and the parties bound thereby* solely on principles of Missouri law wholly foreign to the pleaded Iowa law which determines the descent of the property involved without doing violence to the mandate of Section 1, Article IV of the United States Constitution?

STATEMENT.

The facts in the matter are few and simple. The respondent, Lillian Cowgill, and her husband, Guy M. Cowgill, deceased, agreed to adopt the petitioner. The adoption contract was in all respects complied with by the Cowgills, the petitioner and petitioner's father, with the one exception that no statutory proceedings of adoption were had by the Cowgills. After the death of Guy M. Cowgill, his sister, Clara Cowgill Cochrane, died intestate as to a portion of her property, a resident of the state of Iowa, owning property in said state which property is now being administered upon in the state of Iowa.

The adoption laws of neither the states of Missouri nor Iowa give any inheritable rights to the collateral kin of the adopting parties. Missouri recognizes the principle of equitable adoption as creating the status of adoption. Iowa does not. In Iowa (where the deceased leaves neither spouse nor child) inheritance goes to heirs of other designated parties, irrespective of blood relationship. In Missouri such inheritance follows the blood of the deceased.

The present proceedings were instituted in the state of Missouri for the reason that most of the respondents and petitioner live in that state. In the petition it is alleged (R. 12) that petitioner had made claim under the laws of *descent of intestate property of the state of Iowa* that she was entitled to the intestate property left by Clara Cowgill Cochrane, had served notice to that effect and that her claim and right to said property was based on two propositions:

1. That she had the status of an adopted child of said Cowgills, paragraph 10 of the petition (R. 13).

2. As a further basis of her claim she relied on the laws of the state of Iowa, paragraph 11 of the petition (R. 13).

In the answer of the guardian *ad litem* and attorney for other parties (R. 17) it is alleged that the Missouri court in applying the Iowa law would look to Missouri law to determine whether or not there was a right of succession. This issue, of course, was never determined because even though the pleader acknowledged that the Iowa law applied, the Supreme Court of Missouri did not apply such law for any purpose. In the other answer filed in the proceedings (R. 18-19) it is specifically alleged that the Iowa courts are bound by the status of adoption or non-adoption by the laws of other states and if the status of adoption actually exists under a foreign state then a child enjoying such a status inherits from the collateral kin of the adopting parents, and thus the law relied upon by plaintiff is specifically pleaded.

The judgment in the trial court was to the effect that petitioner was the adopted daughter of the Cowgills, and gave petitioner a right of inheritance against said adopting parties and concluded that since there was no statutory

adoption the petitioner had no right or claim to the Iowa property (R. 25-26).

The trial court specifically found that the petitioner's claim to said property (concerning which notice was filed in the Iowa proceedings) was based on her claim to status and her reliance on the laws of Iowa (R. 24).

Appeal was taken, and as shown by the motion for new trial the basis of the appeal was that the trial court failed to declare the Iowa law and the rights of petitioner thereunder as same applied to her claim to the intestate property of the deceased Cochrane. See grounds for motion for new trial numbered 41 (R. 33), 58 (R. 36), 60 (R. 36) and 62 (R. 37).

Thus through every possible means known to Missouri procedure, the laws of Iowa were injected into the proceedings in this case.

In the Kansas City Court of Appeals, the Honorable Samuel A. Dew in the dissenting opinion Menees vs. Cowgill, 214 S. W. 2d 561, 567, which necessitated the transfer of the cause to the Supreme Court of Missouri, speaking of the application of the Iowa law, fully recognized that the only purpose of all the parties pleading the Iowa law was that through such law the respondents became and were necessary parties to the Missouri proceedings. Judge Dew had this to say:

> "Whether she has such a claim or can prevail in it, or has no cause of action at all consequent to a decree of adoption is of no concern or responsibility of this court in the present proceedings under Section 1126, except if mentioned in the petition, it may serve as justification for her present action against the parties joined."

That this was the petitioner's theory of the case from the beginning see petition and her ground for new trial No. 26 (R. 31).

The Supreme Court of Missouri wholly ignored the Iowa law so pleaded by all of the parties and determined the entire matter upon principles of Missouri law. Finding no property in Missouri, the petitioner was declared to be the adopted daughter of Lillian Cowgill, and the court announced the Missouri principle that equitable adoption was binding on the adopting parties and their privies. Without discussing or determining the issue of privity (controlled by Iowa law) made by the pleadings and recognized as an issue in the case by Honorable Samuel A. Dew, the Supreme Court declared that petitioner was not the adopted daughter of Guy M. Cowgill, deceased.

REASONS FOR GRANTING WRIT.

Petitioner finds herself in the unnatural position of having been adopted by the respondent, Lillian Cowgill, and not by her deceased husband, Guy M. Cowgill, though from all of the evidence and records in the matter, Guy M. Cowgill acting for himself and for Mrs. Cowgill, made the agreement to adopt. The only reason why she does not have a foster father is because the Supreme Court of Missouri has failed to apply the pleaded and applicable Iowa law to determine whether or not there was justification for the petitioner's action against the respondents in the case. In other words, because the Supreme Court of Missouri failed to determine whether or not there was privity of claim between the parties to the suit, then, except as regards the status of petitioner to Mrs. Cowgill (which was in no way disputed), she has for her efforts a negative determination of an issue without the benefit of discussion or consideration of the only law determinative thereof.

In so far as the descent of the Iowa property is concerned the Missouri court is bound to give full faith and credit to the laws of Iowa which control such descent and not giving any faith nor any credit to such laws, the mandate of the Constitution is not complied with.

In the petition (R. 14) it is specifically alleged that in the event the petitioner should not be found to have the status of an adopted child, then the respondents "described and made parties herein" would be entitled to the intestate property on distribution, the reference being to the Iowa law.

Thus the petitioner recognizes that respondents have a *prima facie* right to the said property subject only to being defeated by the proceedings instituted by her. She in effect is setting up her status as a *defense* to a right recognized in the respondents.

Where the laws of another state are pleaded as a defense, this Court has held that the court of the forum must give full faith and credit to the laws thus pleaded, for to do otherwise would be denying to the pleader a defense that he could not later use. Thus in *Bradford Electric Light Company* v. *Clapper*, 52 S. Ct. 571 (286 U. S. 145), the workmen's compensation law of another state was pleaded as a defense to the proceedings had in the state of the forum. The lower court refused any credence to such foreign law. This Court reversed the decision, and had this to say, l. c. 576:

> "A state may, on occasion, decline to enforce a foreign cause of action. In so doing, it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere. But to refuse to give effect to a substantive defense under the applicable law of another state, as under the circumstances here presented, subjects the defendant to irremediable liability. This may not be done."

The Honorable Ewing C. Bland of the Kansas City Court of Appeals believed that the petitioner should have instituted her proceedings in Iowa where the property was located. He said, l. c. 566:

> "Plaintiff says that she could have obtained the relief sought here by filing suit in the State of Iowa. We think that the authority that she has cited in support of this contention (*Genz* v. *Riddle*, 199 Wis. 545, 226 N. W. 957) supports the theory that plaintiff by filing a suit in Iowa can have her status as an adopted child of Guy M. Cowgill recognized and her interest, if any, in the Cochrane estate determined * * *."

No doubt this could have been done as authorized by the Wisconsin case, and had the suit been instituted in Iowa, certainly the equitable adoption laws of Missouri would have been applied by the Iowa court as the Wisconsin court did. If a state court is bound to apply the adoption laws of another state, then it appears to us that necessarily where inheritance is involved a state court would have to apply the laws of the state where the property is located.

It is understandable why Judge Bland believed that petitioner's proceedings should be dismissed. He treated the matter as a "foreign cause of action." The Missouri Supreme Court treats the proceedings as a local action but ignores the substantive defense by the petitioner to the *prima facie* claim of respondents to the Iowa property. We say as did Justice Brandeis in the Clapper case "THIS MAY NOT BE DONE."

In connection with the contention that there is privity of claim between the petitioner and the respondents as to the Iowa property, such as to necessitate a declaration of petitioner's status binding on the respondents, as unqualifiedly required by Missouri law, and all the opin-

ions in this case, we refer the Court to petitioner's motion for rehearing where the matter has been fully discussed to the undoubted conclusions:

1. That privity is germane only to the devolution of property.

2. That parties are in privity who have successive claims or relationships to property.

3. That the laws of Iowa determine the descent of Iowa property.

4. That under the laws of Iowa descent is cast upon parties or the heirs of parties resurrected or assumed to have survived other parties and to have died in possession and ownership of the property.

5. The Iowa law presents successive steps and relationships to property.

6. That all the parties to this suit claim the Iowa property and relationships thereto through the identical statutes of the state of Iowa and at successive steps of such law. The successive steps provided by the Iowa law of descent are shown as 1, 2 and 3 on a chart of Iowa inheritance at the end of the petition. There can be no sidestepping any of the successive steps provided by the law such as shown by the red line, for to do so and determine heirship of Guy Cowgill after the grandparents are resurrected would result in the heirs of Guy Cowgill so determined receiving only two eighths (2/8) of the property instead of the whole thereof as the statutes specifically provide and as results from taking the steps successively as shown by the chart.

7. The petitioner's right to declaration of a status of adoption is absolute under Missouri law, and all the de-

cisions, including those in this case, if only there be parties in privity of claim with her to the Iowa property.

8. The issue of privity has to be determined by Iowa law as it relates to the descent of the Iowa property.

9. There is privity of claim through (a) the Iowa law by which all parties claim their several interests; (b) on the issue of privity of claim until heirship of Guy Cowgill be determined, petitioner claims as his adopted daughter and the respondents claim as his cousins (not the cousins of Cochrane as under the Iowa law she does not have heirs except those who qualify first as heirs of someone else). All parties, therefore, now claim through Guy Cowgill; (c) by virtue of the Iowa statute and through all its successive steps all the parties claim as and are made heirs of Cochrane irrespective of blood relationship. Therefore, there is privity of claim through her as to all parties claiming as heirs of someone else in the line of descent.

10. In Missouri where descent is through blood privity can be between only parties in the blood stream of the ancestor. In Iowa where descent is through position of heirship to parties assumed to have survived other parties then there is privity of claim between those claiming as the heirs of each and all of the parties assumed to have survived in the course of descent.

Privity means nothing more than the relationship that all parties bear to each other who through a single source claim the same property. That this source must be a blood stream of the ancestor in Missouri is shown by the opinion of the Supreme Court in *St. Louis Union Trust Company* v. *Hill*, 79 S. W. 2d 685, l. c. 689:

> "The Legislature had a right to and did in strong and emphatic language change the blood stream of an adopted child. Under our present statutes an adopted

> child's relations with its natural parents cease; and by law it becomes the child of its adopting parents *for every purpose* as fully as though born to the adopting parents in lawful wedlock. In other words, the adopted child is taken out of the blood stream of its natural parents and placed, by the operation of law, in the blood stream of its adopting parents, if adopted under the provisions of our present statutes."

If ever the Missouri Supreme Court specifically approves the inheritance of an adopted child from collaterals of the adopting parties, it will be on the blood stream theory through which such adopted child now inherits from its adopting parents. In *McIntyre* v. *Hardesty*, 149 S. W. 2d 334, l. c. 336, the Supreme Court said:

> "A lawyer friend of the writer used to say, 'property follows the blood.' That thought is emphasized, I think, in *Hockaday* v. *Lynn, supra,* in construing the then statute."

Again, at l. c. 337, it was said:

> "And again, grant that, as it were, it may 'change the blood stream' for inheritable purposes * * * if * * * the right of an adopted child to inherit from the *kindred* of the adopter, was intended by the law-making body to be made, it should so appear in the Legislative Act making such change. In our opinion it does not so appear in the 1917 Act."

If this Missouri theory of inheritance is compared with the position theory of inheritance provided for by the laws of descent and distribution of the State of Iowa, as announced in the cases of *Lawley et al.* v. *Keyes et al.* and *McAllister* v. *McAllister,* cited in the motion for rehearing, where a stepmother inherits from her stepson, we readily see that the two states are very far apart in their theories of inheritance, and as heretofore stated, they are likewise far apart on the matter of status, as only Missouri recognizes equitable adoption as creating a true status.

After all, the problem in this case is simple. It is the problem of giving faith and credit to and applying that state's law which creates a status and giving faith and credit to and applying that state's laws which determine the descent of property, and, since the descent of property determines the question of privity, the then determination that by virtue of the laws of the forum a person has, or has not, a recognized status which is binding upon the other parties to the suit because of the relationship all the parties bear to the property involved under the laws of the state of descent. In other words, it is a question of rendering unto Missouri the things that are Missouri's and rendering unto Iowa the things that are Iowa's.

This is not a case where in the forum the court merely interprets the laws of another state. No question of interpretation is involved because the Iowa law is pleaded and agreed upon by the parties. This is exclusively a case where the Missouri Supreme Court refuses to give effect to, or any faith and credit to the laws of Iowa. Every pleading filed brought those laws into the case, the only issue in the case is controlled by them, and we submit that there can be no determination in this case without some faith and credit being given such laws.

CONCLUSION.

For these reasons, we respectfully submit that this petition for a writ of certiorari should be granted.

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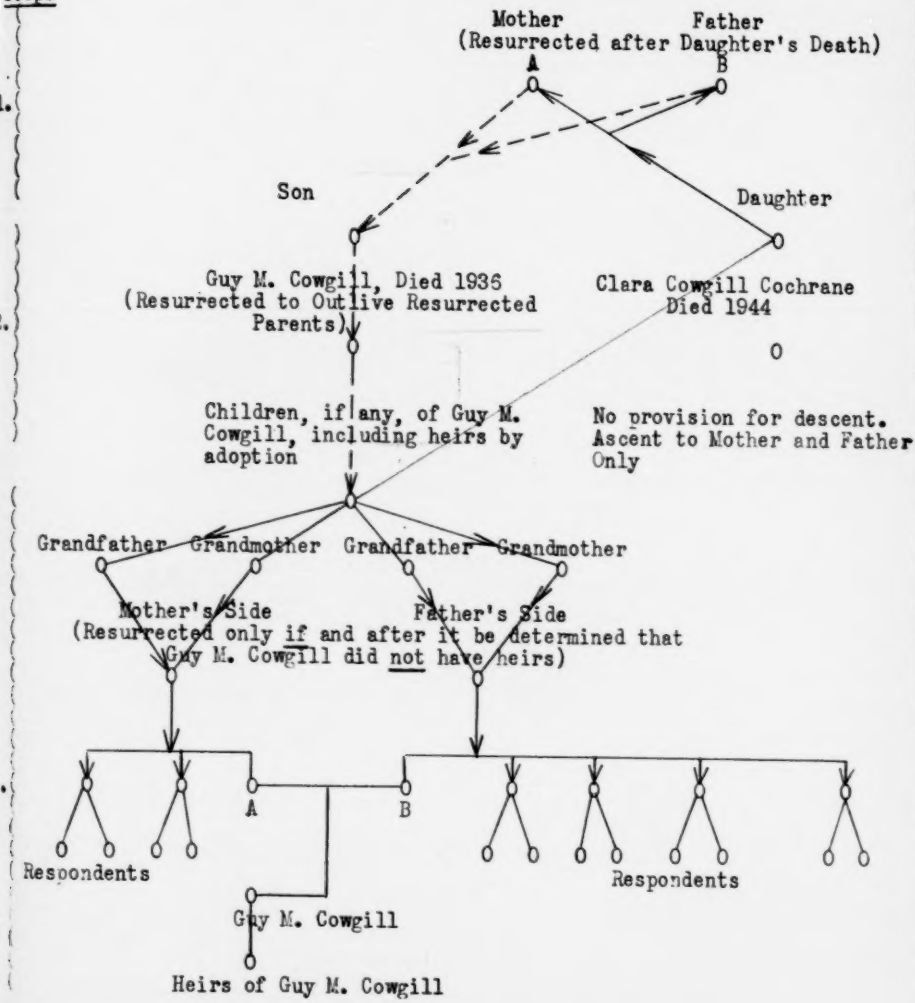
CHART OF THE IOWA LAW OF DESCENT AND DISTRIBUTION

Steps



Note:
1. Course of Descent with the Arrows
2. Positions A and B represent the Mother and Father of Clara Cowgill Cochrane.

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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STATEMENT.

The petitioner here was the plaintiff in the circuit court and the appellant in the Supreme Court of Missouri. We shall hereafter refer to her as the petitioner.

The case was decided in the Circuit Court of Jackson County, Missouri, on petitioner's motion for judgment on the pleadings (R. 20-21). In order that the issues in the Missouri courts may be before this court, we state as briefly as we may the substance of the pleadings (R. 4-20).

In the Circuit Court of Jackson County, Missouri, the petitioner filed her "Petition for Declaratory Judgment," alleging that in 1920, when she was a small child, Guy M. Cowgill and Lillian Cowgill, his wife, at Kansas City, Missouri, where the Cowgills resided, had promised the petitioner's father that if he would give her to them, the Cowgills, they would adopt her; that her father had given her to the Cowgills at Kansas City, Missouri; that she had lived with the Cowgills, at Kansas City, Missouri, until 1936 as their child, discharging all the duties of a child toward them; that Guy M. Cowgill had died in February, 1936, a resident of Kansas City, Missouri, and that thereafter petitioner continued to reside with Lillian Cowgill until petitioner's marriage in July, 1936, after which she resided with her husband in Kansas City, Missouri; that Guy M. Cowgill left a will; that she was named as his daughter and as a beneficiary in said will, and that administration upon the estate of Guy M. Cowgill had been completed and the executrix discharged.

The petitioner further alleged that on April 11, 1945, Clara Cowgill Cochrane, a resident of Montgomery County, Iowa, and a sister of Guy M. Cowgill, deceased, died testate as to a portion of her property, leaving surviving her "neither parent, no spouse, no natural or adopted child, no issue, nor descendant"; that she left a will, which contained no residuary clause, and that she died intestate as to a part of her property; that the petitioner had made a claim that under the laws of descent and distribution of the State of Iowa, she was entitled to have and receive all the real and personal property of the decedent, Clara Cowgill Cochrane, which constituted the intestate part of the property of which she died seized, and that notice of said claim had been filed in Montgomery County, Iowa; that as a further basis of her claim (R. 12) to the intestate

property of Clara Cowgill Cochrane, deceased, petitioner relied on the laws of the State of Iowa.

Petitioner further alleged that "statutory formulas required by law relating to the adoption of children" were not complied with, and prayed the court for a decree that she was the adopted child of Guy M. Cowgill and Lillian Cowgill, as against all of the defendants (who were the executor of Clara Cowgill Cochrane's will, and a great number of Clara Cowgill Cochrane's collateral kin).

The defendants denied that the petitioner was ever adopted by the Cowgills, or either of them, and further alleged that none of them was a party to said contract to adopt made by the Cowgills, and prayed for a declaratory judgment that as to them the petitioner was not the adopted child of Guy M. Cowgill. The judgment of the circuit court was in effect that as to the defendants, except Lillian Cowgill, the petitioner was not entitled to a decree that she was an adopted child. The petitioner appealed. Lillian Cowgill, who was petitioner's blood aunt, did not appeal.

The Doctrine of Equitable Estoppel, in Missouri.

As shown by the opinion of the Supreme Court of Missouri in this case (R. 42), reported as *Menees* v. *Cowgill*, 223 S. W. 2d 412, and the authorities cited therein, equitable adoption, which is peculiar to Missouri, does not create the *status* of adoption as against the world. As said in the court's opinion in this case (R. 51):

> "A decree of equitable adoption merely forecloses 'the parties to the suit against a denial of the status that the court declares' and the status decreed exists only in equity and against the judgment defendants."

"Equitable adoption" is not an alternative to the statutory form of adoption. It is decreed to prevent fraud or

wrong doing, and to prevent the person who has made the promise to adopt from taking advantage of the child for the promisor's benefit. It affects nobody but the promisor and *his* estate. Under such an adoption the person so adopted does not, by reason of such equitable adoption, inherit from the natural children of the promisor (*Weber* v. *Griffiths*, 349 Mo. 145, 159 S. W. 2d 670), or from the ancestors of the promisor, or from any of his collateral kin (*McIntyre* v. *Hardesty*, 347 Mo. 805, 149 S. W. 2d 334). Thus it is seen that under such equitable adoption the person so adopted takes only *from* the promisor and *his* estate, but never takes *through* the promisor. The promisor and his estate are estopped by the decree from denying an adoption, and this is as far as any Missouri case has ever gone. The doctrine of equitable adoption is based solely upon equitable principles and is resorted to for the sole purpose of preventing a fraud by the promisor as against the child for whose benefit the promise was made, provided the child has complied with the contract made for his benefit. The equities must be on the side of the child for whose benefit the promise was made. While the Missouri courts have used some language in which they speak of the child as having the status of an adopted child, a reading of the cases will disclose clearly that what the court meant in using such language was that the child enjoyed the status as against the defendant promisor or as against *his* estate.

Position of Petitioner Before the Missouri Supreme Court.

It is clear that petitioner relied upon some dicta in the case of *Lindsley* v. *Patterson*, 177 S. W. 826, and other cases considered and discussed in the opinion of the Supreme Court of Missouri (R. 49). These apparently led her to believe that when the contract to adopt was made, regardless

of the fact that the Missouri statutes were never complied with, she became in fact an adopted child as against the world, as fully as if the statutes had been complied with.

As above stated, the doctrine of equitable adoption is peculiar to Missouri. It is not recognized in Iowa. So that petitioner, believing she was actually adopted by the Cowgills because of the contract, sought to get a declaratory judgment to that effect in Missouri, which she could not get in Iowa, in order to inherit property in Iowa to which such decree would not entitle her in Missouri.

In said *Lindsley* case the writer of the opinion had used the following language (l. c. 831):

> "* * * I assert that any person who was capable of contracting could, at common law, adopt a minor child as his or her own son or daughter, in the same sense that he might enter into any other contract,"

and further said (l. c. 829):

> "First, was Mabel legally adopted as a child by Laura D. Patterson according to the principles of the common law?"

The Supreme Court of Missouri in the case at bar, concerning the foregoing dicta in the *Lindsley* case (R. 49), said:

> "A reading of the opinion referred to and a reference to the authorities upon which it is based indicates that the case involved an equitable adoption proceeding, the action being essentially for the specific performance of an oral contract of adoption, where a failure to decree an equitable adoption would have been a fraud on the child. In so far as the case refers to adoption according to the principles of the common law, the case has not been cited or followed."

The Missouri court stated the petitioner's position in that court as follows (R. 44):

"Appellant insists that no amount in money or property is in dispute before the court; that the action is one *in personam;* that the only issue made by the pleadings relates to the 'status' of the plaintiff; and that she did not ask any further relief. Appellant further states: 'It is true as the respondents say that the appellant seeks only a decree of adoption. * * * Since 1920 she has or she has not had the status of and has been the adopted child of Guy M. Cowgill. She needs proof of this status, alleged to have been created in Missouri, under Missouri law, and the purpose of this action is to get that proof. * * * The plaintiff seeks a decree of adoption Period. That such a decree would make her the child of Guy M. Cowgill and Lillian Cowgill, "with all of the legal relationships, rights, privileges, powers and immunities which the law creates between natural parents and their child," is a matter not of decree but rather a matter of consequence of the decree. It also is a matter of law, or consequence, rather than of the decree that *an equitable adoption creates the same relationship* which would be *created by a strict compliance with the adoption statutes of Missouri*' (Italics ours). In addition appellant contends that a *legal* adoption was effected and a *legal* status of adopted child of Guy M. Cowgill was created by the alleged contract of adoption and the admitted facts, although the contract was unperformed to the extent that 'the statutory formalities required by law relating to the adoption of children' were never complied with. Appellant insists that her *legal* status as an adopted child can be recognized and declared under the declaratory judgment act against persons who were not parties to the contract and particularly against the respondents who claim the Iowa property as the heirs at law of Mrs. Cochrane. Appellant says 'her status exists as well now as though she had been formally adopted' " (Emphasis are the court's).

And further (R. 48), the court states that appellant says "that the action is not based upon estoppel, fraud or in-

ducements but on contract, and that there was a legal adoption regardless of any compliance with statutory provisions." And further (R. 47), "appellant did not plead representations, inducements or fraud as a basis for an estoppel against any of the defendants. * * *." And further (R. 50), "appellant admits that the courts of this state have 'the exclusive right to determine that status,' and that the ownership of Iowa property is not directly involved, nor within our jurisdiction."

Holding of Missouri Supreme Court.

Upon the issues thus presented to the Supreme Court of Missouri, that court held (R. 47) that "adoption was unknown to the common law and exists in this state only by statute." The court cited with approval (R. 50) 2 Beale's "The Conflict of Laws," page 713, Section 142.1, as follows:

> "In order to create the status of adoption there must be some formal legal act; and as the common law knows no such status, it can only be created in strict and formal conformity to the terms of some statute. It cannot be created by contract or agreement."

The court held, however (R. 48):

> "It has long been recognized, however, that a person who is legally competent to adopt may enter into a binding contract whereby for a good consideration he agrees to take another as his child. Where such contract is actually made and based upon a good consideration and where it is fully performed by the person to be adopted but is not performed by the promisor during his lifetime, a court of equity will declare specific performance against the adopter's estate to the extent at least of making the adoptee an heir" (citing Missouri cases).

But the court stated (R. 51):

> "If Guy M. Cowgill had legally adopted appellant in compliance with statutory requirements, the adoption would have been binding on all persons, including the respondents, but in an equitable proceeding based upon contract, only the parties thereto, *or those in privity with them are bound*" (Emphasis ours).

(The last above emphasized part of a sentence in the opinion is the sole ground of petitioner's contention here that the decision ignored the Iowa statute, and of her further contention here that the *decision* was violative of Section 1, Article IV of the Constitution of the United States.)

A reading of the remainder of the same paragraph of the opinion discloses that the court was merely discussing the effect of a *decree of equitable adoption, if granted.* The court proceeds:

> "Equity acts only against specific individuals, and, in such case, one person may be bound and not another. A decree of equitable adoption merely forecloses 'the parties to the suit against a denial of the status that the court declares' and the status decreed exists only in equity and against the judgment defendants. As between appellant and the respondents, appellant was not, in either law or equity, the adopted child of Guy M. Cowgill *by reason of his contract to adopt her and the facts and circumstances admitted*" (Emphasis ours).

The Supreme Court of Missouri did not hold that the respondents were or were not in privity with Guy M. Cowgill, deceased.

ARGUMENT.

No Question Involving Section 1, Article IV of the Constitution of the United States Was Presented to or Decided by the Supreme Court of Missouri.

The petitioner's sole contention here, it seems to us, is that because the Supreme Court of Missouri did not decide that the respondents were in privity with Guy M. Cowgill, deceased, the court failed to give full faith and credit to the Iowa statutes. Not only did the Missouri court not decide the question of privity, but there was no occasion, under the pleadings and the presentation of the case, for a decision on that question, because the only effect of such a holding would have been to place the respondents in a class against whom, under proper pleadings and presentation of the case, a court of equity, as against them, might have invoked estoppel to deny petitioner's adoption.

It is conceded that the petitioner was never adopted under any statute of Missouri. If not estopped so to do, any party, even including the promisor, could have denied her adoption. Petitioner believed she was adopted by the contract and consequently that she did not need or desire to invoke estoppel. Certainly these respondents, even if held to be privies, could deny the adoption, unless a court of equity, under equitable consideration, held them to be estopped. As pointed out in the opinion in the case at bar, not only was estoppel not pleaded (R. 47), but "appellant says that the action is not based upon estoppel, fraud or inducements, but on contract, and that there was a legal adoption regardless of any compliance with the statutory provisions" (R. 48).

Thus it appears clear that petitioner now seeks a writ of certiorari from the Supreme Court of the United States to review a decision of the Supreme Court of Missouri on a question which not only was not presented to the latter court, but which the petitioner by her pleadings and by her presentation of the case, actually prevented the court from considering.

One cannot escape the conclusion that petitioner misconstrued the former Missouri decisions on equitable estoppel. It is clearly shown that she believed, *by reason of the contract*, that she was an adopted child, and her only purpose in seeking a declaratory judgment to that effect was, as stated to the Supreme Court of Missouri, that she might have "proof" of that adoption (R. 44). As presented to the Missouri Supreme Court, the defendants were joined in the action *not because of their claimed fictional privity with Guy M. Cowgill, or that by virtue of that privity they might be estopped to deny the adoption,* but, as stated by the court (R. 50), "the respondents were made defendants solely upon the theory that they were the collateral kin and heirs at law of Clara Cowgill Cochrane, deceased; and that they were claiming the intestate property of her estate," and accordingly interested in a determination of petitioner's status. Her action was brought as an action for a declaratory judgment, and the Missouri statute (Sec. 1136, R. S. Mo., 1939) *required her* to make parties all persons "who have or claim any interest which would be affected by the declaration," and further provided that "no declaration shall prejudice the rights or persons not parties to the proceedings."

Furthermore, the record discloses that no question as to the Missouri court's denial of full faith and credit to the Iowa statutes was raised at any time in the Supreme Court of Missouri. Not even in petitioner's motion for rehear-

ing (R. 52) was the question called to the attention of the Missouri Supreme Court (*Johnson* v. *New York Life Ins. Co.*, 187 U. S. 491, 47 L. Ed. 273). Nor was such question raised in the petitioner's motion to transfer the cause to the court *en banc* (R. 61), in which motion the petitioner merely insisted that the decision of Division No. 1 of the Missouri Supreme Court was in conflict with certain decisions of Division No. 2 of said court, and with certain decisions of said court *en banc*, although Section 9, Article V of the 1945 Missouri Constitution, makes it mandatory upon application of the losing party, for either division of the Missouri Supreme Court, where a federal question is involved, to transfer the case to the Missouri Supreme Court *en Banc*. Said section is as follows:

> "A cause in the supreme court shall be transferred to the court *in banc* when the members of a division are equally divided in opinion, or when the division shall so order, or on application of the losing party when a member of the division dissents from the opinion therein, *or a federal question is involved*, or pursuant to supreme court rule."

It therefore appears that petitioner has not exhausted her remedy in the Missouri courts (*Osment* v. *Pitcairn*, 317 U. S. 587, 87 L. Ed. 481).

Conclusion.

The writ of certiorari should be denied because

(1) Petitioner did not present the alleged federal question to the Supreme Court of Missouri;

(2) Petitioner, in failing to raise the alleged federal question in her application for transfer of the case to the Missouri Supreme Court *en Banc*, failed to exhaust her remedy in the state court;

(3) As the case was presented to the Supreme Court of Missouri, that court did not and had no occasion to pass upon the application of the Iowa statute, and therefore any claim that the Missouri court denied full faith and credit to any Iowa statute is wholly unfounded.

Respectfully submitted,

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